disclaimer will be filed upon the indication of allowable subject matter or the response must traverse the rejection with reasoned argument or evidence.

Applicants disagree. The obviousness-type double patenting rejection made by the Office was ***PROVISIONAL***. The U.S. Court of Customs and Patent Appeals has explained the benefits of the provisional obviousness-type double patenting rejection practice. *In re Mott*, 190 .S.P.Q. 536, 540 (1976). The applicant is made aware of the existence of "double-patenting" at an early date and has the opportunity, if he so desires, to elect which application to let issue. *Id.* Meanwhile, the PTO benefits by hastened prosecution. *Id.* In *Mott*, the PTO attempted, in effect, to make the rejection final rather than provisional. *Id.* The court did not permit this result. *Id.* In reaching its decision, the court indicated: "Once the provisional rejection has been made, there is nothing the examiner and the applicant must do until the other application issues." *Id.* at 541.

In the present case, the Office is treating the rejection as final instead of provisional. As in *Mott*, this should not be permitted. Moreover, as indicated in *Mott*, there is nothing that applicants must do until the other application issues. *See id.* Accordingly, the Office's requirement that applicants either affirmatively state that a terminal disclaimer will be filed upon the indication of allowable subject matter or traverse the rejection with reasoned argument or evidence is in error and should be withdrawn.

Nonetheless, applicants traverse the rejection. Claims 17 and 18 were provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 13 of copending Application No.

FINNEGAN
HENDERSON
FARABOW
GARRETT &
DUNNER LLP

1300 I Street, NW
Washington, DC 20005
202.408.4000
Fax 202.408.4400
www.finnegan.com

08/308,218 ("the '218 application") in view of White et al. Claims 15 and 16 were provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 11-22 of copending Application No. 08/202,239 ("the '239 application") in view of White et al. Claims 15-18 in the instant application and claims 11-22 of the '239 application have been canceled. The Examiner's reasoning that applicant's claims are drawn to the identical products, the ORF R, and claim 17 simply includes reagents for the hybridization reaction and claim 18 further teaches the use of labels, is not applicable to applicants' current pending claims in these applications. Accordingly, applicants respectfully request withdrawal of the rejection.

Applicants respectfully submit that this application is now in condition for allowance. In the event that the Examiner disagrees, he is invited to call the undersigned to discuss any outstanding issues remaining in this application in order to expedite prosecution.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: November 18, 2002

By: _____

Salvatore J. Arrigo
Registration No. 46,063
Telephone: 202-408-4160
Facsimile: 202-408-4400
E-mail: arrigos@finnegan.com

FINNEGAN
HENDERSON
FARABOW
GARRETT &
DUNNER LLP

1300 I Street, NW
Washington, DC 20005
202.408.4000
Fax 202.408.4400
www.finnegan.com